IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 799 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

THAKOR UDAJI ABHUJI AND THAKOR PRAHLADJI MANAJI

Versus

STATE OF GUJARAT

Appearance:

MR JM BUDDHBHATTI & Mr. Devang Trivedi L.A.for Petitioners (Amicus Curiae)

Mr. K.G.Sheth, Learned PUBLIC PROSECUTOR for Respondent

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 26/06/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE SHARAD D.DAVE)

1. The appellants/original accused of Sessions Case no. 272 of 1992 have preferred this appeal against the judgment and order of the learned Sessions Judge, Mehsana dated 14.5.1993, by which both the appellants have been convicted under Sec. 376 and 363 of the Indian Penal Code and each of them is sentenced to undergo rigorous imprisonment for ten years and a fine of Rs.500/- in default to undergo rigorous imprisonment for two years for the offence under Sec. 376 of the Indian Penal Code and rigorous imprisonment for one year for the offence under Sec. 363 of the Indian Penal Code. Both the sentences are ordered to run concurrently.

2. We may state here that after the appeal was presented by the appellant/original accused through the jail and after it was admitted by this court on 20.12.93, both the appellants were given legal assistance of the Advocate Sri B.N.Raval. When the appeal was called out for hearing, the learned A.P.P. for the State pointed out to us that the Advocate Sri Raval has gone to Canada. Thereupon, with a view to provide proper legal help of an advocate for defending the accused, we appointed Advocate Sri Buddhbhatti to appear for both the accused. He has ably argued on behalf of the accused with the assistance of advocate Mr.Trivedi and we record our appreciation for the efforts put in by these advocates.

3. It is the prosecution case that the complainant Kodriben w/o Tarsangji Javanji on 8.6.92 was sleeping along with her daughter Sajna, outside their house on a cot. At about 2.30 a.m. of the night between 8th June, 1992 and 9th June, 1992, her daughter minor Sajna woke her up and told her that two persons had taken her to the river bank and both had committed indecent act (i.e.rape) on her. When she checked the clothes of her daughter, she found that her "gaghri" (petticoat) was full of blood and on checking her private part, she noticed that her daughter (who was eight years old) had been raped. On being informed about this by the complainant-Kodriben, her husband, i.e. father of the victim, his elder brother Shankarji and others went to the river bank in search of the said two persons but could not find anyone there. The prosecutrix Sajna, who was frightened, had at that time only stated that the persons were wearing pant and shirt. She did not name them initially when she woke up her mother on account of fright and confusion. Sajna was then admitted to Visnagar Government hospital for treatment at about 4 a.m. The FIR lodged in the morning is on record at exh. 19. It is the say of the victim's

mother Kodriben that after the doctor gave an injection to her daughter at 4 a.m., she was under sedation and she came out of the stupor in the evening at about 4 p.m. She had stated that first the accused no. 1 and after him the accused no. 2 had raped her. She came to know their names when they were addressing each other. When Udaji was on her, Prahladji asked him to get up and that is how she came to know about the names of the two persons.

4. It is the say of the prosecution that the accused no. 1 Udaji Abhuji was identified on 1.7.92 in presence of the panchas in the hospital where the prosecutrix Sajna was admitted for treatment. The other accused Prahladji Manaji was also arrested on 21.8.92 at a later stage. The police to whom the investigation was handed over, recorded the statements of various witnesses, carried out the panchanama of the scene of offence, seized the clothes as well as blood samples of both the accused and victim Sajna, sent the seized articles for analysis to the F.S.L. and obtained the report. After completion of the investigation, the chargesheet was filed against both the accused in the court of Judicial Magistrate (First class), Visnagar, District : Mehasana on 14.9.92 who committed the case to the Sessions Court Mehasana for trial.

4.1 On appreciation of the oral and documentary evidence adduced by the prosecution, the learned judge held that it was proved by the prosecution that both the accused had committed rape on the minor Sajna. Accordingly, by the impugned decision the accused were convicted under Sec. 363 and 376 of the Indian Penal Code and sentenced as stated above, giving rise to the present appeal.

4.2. The learned trial Judge found that the incident took place at midnight i.e. at about 2.30 a.m. of 9.6.1992 in a small village and therefore one cannot expect any direct evidence of the incident of the witnesses other than the prosecutrix. It is established that victim Sajna was only 8 years of age at the time of the incident. She was in a deep sleep along with her mother when she was taken away by the accused persons. She was of such a tender age that she could hardly be expected to comprehend as to what was being done to her. It is not the defence of the accused that they were named due to any spite or enmity by the complainant, and there was absolutely no reason for the complainant to falsely implicate the accused. In fact, no mother could ordinarily make such allegations of rape on her minor

daughter of 8 years of age unless she is told by the victim and the identity of the offenders is established.

5. The victim Sajna was examined in the hospital by Dr.Kashibhai Ganeshbhai P.W.1, on 9.6.1992 at about 7 a.m. In his deposition exh. 16 he has stated that he found that she was about eight years of age and there was no growth of pubic hair. She was having the following injuries as stated in the certificate exh. 17 issued by him:

"Contused semi-circular teeth marks red in colour
2 1/2 cm. upper and lower both on right side of face below the right eye.
Contused semi-circular teeth marks red in colour
2 1/2 cm. upper and lower both on right side of face just below the above injury.
Contused semi-circular teeth marks red in colour
2 cms. anteriorly and lower part of chin (posteriorly)
Contused semi-circular teeth marks red in colour
1 1/2 cm. upper and lower on front and lower 1/3 of right upper arm.
Oedema on upper lip.
Vagina admits one finger.

On internal examination, the doctor found as under :

"Hymen was ruptured
Regular perimical fair 1 cm.

On right parts of vaginal extents upward and backward on posterior vaginal wall upto 2 cms.
Both libia Majora and Minora were swollen.
Per specular and per vaginal examination are painful.
Posterior vaginal wall secretion contains Motile sperms.
No breast development.

In the opinion of the doctor, victim Sajna was raped. The charge exh. 1 was framed against both the accused was framed on 15.4.1993 for the offences punishable under sec. 363, 376 read with Sec. 114 of the Indian Penal Code. The charge was read over & explained to the accused who pleaded not guilty and claimed to be tried.

5(a) The panchanama of the physical condition of the victim is on record at exh. 9. Panch Becharji Thakor in his deposition exh. 26 has stated that the other panch Naniben who checked the private part of the prosecutrix

Sajna found blood stained dressing. Injuries were seen on her waist, right cheek etc. The panchanama reveals that Sajna was raped on the river bank. The girl aged 8 years was raped by the accused as stated by her and during this she has received injuries on her body as per the medical and other evidence.

5(b) The "gaghri" which was blood stained and was sent to the F.S.L. for analysis was having the blood stains mixed with semen. The complainant's husband's elder brother Shankarji Valaji also produced a piece of shirt sleeve which he found from the place of incident on which there was blood showing AB group. From the place of incident, the blood stained soil was also obtained. The underwear of the accused no. 1 was found to be having blood stains of blood group `AB' which was the blood group of the victim's blood. The underwear of the accused no. 2 was found to be having blood stains of the blood of `B' group which was of that accused. None of the accused have explained how their underwears became stained with blood.

5(c). Dr. Kashibhai Ganeshbhai in his deposition exh. 16 has described the injuries of the victim Sajna as stated above. He found that it was a medico legal case and he called the Visnagar police station and gave vardhi which is on record at exh. 23. The vardhi was recorded by constable Nazirmahmad Kalumiya who has in his deposition exh. 38 proved the vardhi at exh. 39. On the strength of that vardhi, P.S.I. Sri Vihol went to the Visnagar general hospital and took down the FIR exh. 19 of the victim's mother. P.S.I.Vihol has stated in his deposition that after going through the entry in the station diary at 9.30 a.m. he went to the Visnagar General Hospital and found that the minor Sajna was frightened and unconscious. He recorded the complaint of her mother Kodriben and sent it to the police station for registering the offence. Under the panchanama exh. 9 he seized the blood stained "gaghri" of Sajna and a piece of shirt collar which was found from the place of incident.

5(d). Tarsangji Jadavji, father of the victim in his deposition exh. 22 has stated that on 8.6.92 he went to the field of one Shankarbhai Hirabhai Rabari at 9 p.m. to change the direction of water when his wife and their daughter Sajna were sleeping on a cot and their son was sleeping on the other cot outside their house, as it was summer. After the midnight while they were fast asleep, two persons wearing pants-shirts came and took away Sajna to the river bank and committed rape on her. Victim Sajna gave the names of these two accused because she

came to know their names when they were calling each other at the time of the incident. According to the complainant Kodriben, when her husband came at 3 a.m. from the field, she narrated the incident to her husband, thereupon, her husband with other persons went to the river bank but could not find anyone there. The witness Shankarbhai also came back from the field on account of failure of light at 3 a.m. as the father of the prosecutrix returned back. The distance between the house of the complainant and his house is about 600 ft. and there are 20 to 25 houses in between. The father of the victim called him at his house and told him the story of Sajna and thereupon they all went to the river bank to find out the persons, but nobody was found. They did find blood stains at the place of the incident.

6. The victim Sajnaben in her deposition exh. 20 has stated that during the night of the incident while she was sleeping with her mother outside their house two persons had taken her near the river bank and beneath a tree her petticoat was removed by them. The accused no. 1-Udaji raped her first and after him the accused no. 2 Prahladji raped her. She has stated that the accused no. 1 had given bites on her face. She had bled from her private part. Udaji had pressed her mouth. Thereafter, they left her near the well and she came to her house weeping and told about the incident to her mother. She clearly identified both the accused in the court. There is nothing brought out in her cross-examination which can throw any doubt over her version. She was with the culprits for more than two hours and had ample opportunity to see their faces when she was taken by them and raped. She was with them for a sufficiently long time to know their names while they were talking to each other and she has clearly identified them. She is fully supported by the medical evidence on the aspect of rape and the bites on her face. Her mother's deposition shows that she did disclose the names of both the accused after she came out of the sedation in the evening. We have no hesitation in accepting her version and are of the view that both the accused had raped this minor girl after kidnapping her during the night between 8th and 9th June, 1992.

7. Witness Babuji Keshaji in his deposition exh. 25 says that at 11 a.m. on 9.6.92, when he was on way to his field, the accused no. 1 met him and told him that his name has been disclosed in the rape case of Mamadpur, and accordingly complaint has been filed against him and persons were trying to trace him out. Babuji was asked to go to village Denap to enquire whether the police had

arrived there. On enquiry, it came to their knowledge that police had reached Denap. The accused no. 1 stayed at the house of witness Babuji during the night and ran away in the early morning. Such conduct of the accused no. 1 was indicative of his guilt, because though his name was not disclosed in the morning of 9.6.92 as the victim was under sedation he after the FIR was lodged assumed that she must have disclosed his name. If he were not involved in the crime, there was no reason for him to fear that the police was after him when his name was yet not disclosed in the FIR. When the FIR exh. 19 was filed at 9 a.m. on 9.6.1992, no names were disclosed and for the first time, the prosecutrix Sajna gave the names of both the present accused at 6 p.m. on 9.6.92 after she came out of the sedation.

8. It has come on record that the P.S.I. Barot on coming to know about the arrest of accused no. 1 had called the accused no. 1 to Visnagar and he was identified by the prosecutrix at the hospital in presence of the panch witnesses as proved by the panchanama exh. 31.

8.1. It was submitted by the learned Advocate appearing for the accused that identification parade was required to be held by the Executive Magistrate but the police had simply brought the accused no. 1 and showed him to the prosecutrix who would automatically identify him as the culprit. In support of his submissions, the learned counsel Mr.Buddhbhatti has relied on the decision in Raju @ Rajendra V/S State of Maharashtra reported in 1998 S.C.C. (Cri) 296 and submitted that the identification parade must be held immediately after the arrest of the accused and failure to do so would result in a benefit to the accused.

While reading the facts of the case before the Hon'ble Supreme Court, it appears that the identification of accused by the witnesses was held for the first time in the court and that too after about one and a half years after the incident took place. In the case before us, there was no need to hold any identification parade as the prosecutrix Sajna was with both the accused for a sufficiently long time to be able to identify them and know their names and she had given their names as soon as she was out of the medicinal sedation in the evening on 9.6.92. For this reason even the decision of the Supreme Court in Jaspal Singh V/S State of Punjab reported in AIR 1997 S.C. 332 and in State of U.P. V/S Charles Gurmukh Sobhraj reported in (1996) SCC(Cri.)1065 cannot assist the appellants. In case of Madan Gopal Kakkad V/S Navan Dubey and another reported in (1992)3 S.C.C. 204 the

Supreme Court has held that the conviction in case of rape can be based on the sole testimony of the prosecutrix without any corroboration if her testimony is otherwise worthy of credence. However, corroboration by medical evidence can be insisted upon where such evidence if forthcoming. In the case before us, the prosecutrix Sajna gave the names of both the accused when she came out of sedation at 6 p.m. on 9.6.92. Her testimony against both the accused is absolutely reliable and trustworthy and is fully corroborated by medical and other evidence and is sufficient to hold that both accused are guilty of the offences under Sec. 363 and 376 of the Indian Penal Code.

9. In State of Maharashtra V/S Chandraprakash Kewalchand Jain reported in AIR 1990 S.C.658, the Hon'ble Supreme Court has held that "the prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of a crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Sec. 118 of Evidence Act and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to S. 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice."

9.1. It is well settled that it is not necessary that the prosecutrix should adduce clinching proof of completed act of rape by each one of the accused on the victim (See Pramod Mahto V/S State of Bihar Criminal Appeal Nos. 295-96 of 1989 dated 21.4.1989(SC) reported in AIR 1989 S.C. 1475). It was held in State of Madhya Pradesh V/S Sunder Lal AIR 1992 SC 1413, being a case where it was not the defence version that there was no light at the scene of occurrence or that the prosecutrix had a mere fleeting glimpse of the accused, that the girl was 13 years' old and she could not have forgotten the

face of the man who committed such ghastly crime upon her.

10. For the foregoing reasons, we find ourselves in complete agreement with the reasoning and findings of the learned trial Judge who has rightly convicted them for the offences under Secs. 363 and 376 of the Indian Penal Code .

10.1. The trial Court has, besides imposing the rigorous imprisonment of ten years and fine of Rs.500/- on each of the accused which we uphold, in default of payment of fine of Rs.500/- ordered him to undergo rigorous imprisonment of two years. We find that the said period of rigorous imprisonment of two years in default of payment of fine imposed on these two accused would work harshly on them as they are not in a position to pay fine. Therefore, while maintaining the sentence of ten years rigorous imprisonment and a fine of Rs.500/already imposed on each of these accused persons, we modify the order of sentence, by directing that, in default of payment of fine of Rs.500/-, the accused will undergo rigorous imprisonment for a period of three months in case of each of the accused persons. Subject to this modification, the appeal is dismissed.

(R.K.ABICHANDANI, J)

(SHARAD D DAVE, J)

srilatha